RE TAN LYE TYING; EX P ECK CONSTRUCTION SDN BHD

HIGH COURT MALAYA, ALOR SETAR
SOFIAN ABD RAZAK J
[BANKRUPTCY NO: 29-435-2003]
4 MAY 2009

BANKRUPTCY: *Petition - Creditor's petition - Whether defective - Whether judgment creditor failed to comply with provisions and rules of Bankruptcy Act 1967 - Whether bankruptcy notice filed and deemed to be good service - Whether act of bankruptcy occurred within six months before presentation of petition - Whether law in force was pre-amended s. 5 of the Bankruptcy Act 1967 - Whether there were merits in argument by judgment debtor - Bankruptcy Act 1967, s. 5(1)(a) & (c)*

The judgment debtor appealed against the deputy registrar's decision dismissing the judgment debtor's summons in chambers (SIC). The facts were that in the SIC, the judgment debtor prayed for, *inter alia* (a) that no act of bankruptcy was committed by the judgment debtor in this proceeding and (b) that the creditor's petition was defective in law and procedure. The grounds for filing the SIC were that (i) the judgment creditor had no cause of action to file the creditor's petition if the act of bankruptcy was committed after 1 October 2003 because the debt amount was less than RM30,000 which was RM25,470.14 (ii) that the bankruptcy notice served on the judgment debtor by way of posting at the judgment debtor's last known address and the posting at the notice board of the High Court was done after 1 October 2003; (iii) that the judgment creditor was incapable to file the creditor's petition if the amount claimed in the bankruptcy notice was less than RM30,000 if the act of bankruptcy was committed after 1 October 2003; (iv) that the judgment creditor had failed to comply with the provisions and rules of the Bankruptcy Act 1967, in particular the amendment to s. 5(1)(a) of the said Act. The judgment creditor submitted that the bankruptcy notice was filed as early as 24 March 2003 but the judgment creditor had difficulty in attempting to serve the said notice on the judgment debtor and it had to be served by way of substituted service *ie*, by posting at the notice board of the High Court on 6 December 2003, advertised in the Star newspaper on 15 August 2003 and posting at the judgment debtor's last known address on 10 December 2005. The judgment creditor further submitted that since the notice was advertised on 15 August

2003, the service was deemed to be good service upon expiry of the 14 days namely on 29 August 2003 and the act of bankruptcy was deemed to have been committed on 6 September 2003.

Held (dismissing the appeal):

(1) In so far as s. 5(1)(a) was concerned, the bankruptcy notice against the judgment debtor was filed on 24 March 2003 but attempts to serve the bankruptcy notice could not be effected and had to be done by substituted service. The advertisement in the Star newspaper was deemed to be notice at large wherever the judgment debtor might be. The judgment debtor could be anywhere in Malaysia, and if he had read the Star newspaper which was a national circulation the judgment debtor would be deemed to have notice of the bankruptcy notice, which meant that if the advertisement of the bankruptcy notice was done on 15 August 2003 and deemed to be good service, 14 days thereafter, the act of bankruptcy would have been committed on 5 September 2003. It would not be necessary for the court to consider the validity of the posting of the bankruptcy notice, at the notice board of the High Court at Alor Star and at the last known address respectively. The two modes of service of the bankruptcy notice was only to complement the advertisement of the notice in the Star newspaper. (paras 20, 22 & 27)

(2) In relation to s. 5(1)(c), this court held that the act of bankruptcy on which the petition was grounded had occurred within six months before the presentation of the petition on 14 January 2004. The act of bankruptcy was deemed to have been committed on 5 September 2003 *ie*, 7 days from the date deemed to be good service of the bankruptcy notice by way of advertisement in the newspaper, and the filing of the petition was 14 January 2004 well within the six months referred to in s. 5(1)(c) of the Act. Herein, the judgment creditor had at the time of filing of the request to file a bankruptcy notice that was on 24 March 2003, the law that was in force was the pre-amended s. 5 which meant the debt owing must be at least RM10,000. The debt amount as stated in the bankruptcy notice dated 24 March 2003 was the sum of RM25,470.14. The court was in full agreement with

Re N Hisham N Mohd Kamal ex parte Amfinance Bhd where the judge held that the applicable law should be the law as it stood at the time when the bankruptcy was filed. Based on the reasons adumbrated above, there were no merits in the argument by the judgment debtor. (paras 28 & 29)

Case(s) referred to:
Re N Hisham N Mohd Kamal Ex P AM Finance Bhd [2009] 7 CLJ 109 ***(foll)***

Legislation referred to:
Bankruptcy Act 1967, s. 5(1)(a), (c)
Interpretation Acts 1948 and 1967, ss. 3, 30

For the judgment debtor - Khor Gaik Thiam; M/s Khor Gaik Thiam & Latsmanan
For the judgment creditor - Ang Chun Pun (Ang Khoon Cheong with him); M/s CP Ang & Co

Reported by Suhainah Wahiduddin

JUDGMENT

Sofian Abd Razak J:

[1] Enclosure 28 is an appeal to judge-in-chambers by the judgment debtor against the learned deputy registrar's decision given on 17 April 2007 dismissing with costs the judgment debtor's summons-in-chambers (encl. 22) (hereinafter called 'the SIC').

[2] The court heard the judgment debtor's appeal on 2 December 2007 and dismissed the appeal with costs. The judgment debtor who was dissatisfied with the said decision has since filed an appeal.

[3] Before the court embarks on giving its reasoning as to why the appeal by the judgment debtor was dismissed, the court wish to correct the enclosure numbers namely the summons-in-chambers filed by the judgment debtor dated 8 September 2005 is marked as encl. 20. The affidavit-in-support affirmed by the judgment debtor dated 27 August 2005 is marked as encl. 21 and the notice of debtor of intention to oppose petition dated 27 August 2005 is marked as encl. 22. So it is not quite correct to state that the summons-in-chambers dated 8 September 2005 as encl. 22. To avoid any confusion, the court will just refer to these documents according to the heading describing them.

[4] In the SIC, the judgment debtor pray for the following order namely:

a) that no act of bankruptcy was committed by the judgment debtor in this proceeding.

b) that the creditor's petition dated 14 January 2004 filed herein is defective in law and procedure.

c) that the costs of this application be borne by the judgment creditor before filing a fresh bankruptcy proceeding.

d) any other order deemed fit and just by the honourable court.

[5] The grounds for filing the SIC are that:

a) that the judgment creditor has no cause of action to file the creditor's petition if the act of bankruptcy was committed after 1 October 2003 because the debt amount was less than RM30,000 and/or

b) that the judgment creditor failed to comply with the Rules and Provisions of the Bankruptcy Act, in particular the amendment to s. 5(1)(a) of the Act (hereinafter called 'the Act').

[6] The judgment debtor in his affidavit-in-support of the SIC stated as follows namely:

1) On 12 August 2005 at about 9.30am, the judgment debtor was served with a copy of the creditor's petition together with an affidavit verifying the facts in the petition, a copy of the order dated 5 May 2005 and a notice advertising a copy of the petition.

2) The judgment debtor handed over the documents received referred to in para. (a) above to his solicitors and was duly advised that the bankruptcy proceedings in particular the creditor's petition was defective in law based on the following reasons namely:

i) that the amount claimed by the judgment creditor based on the bankruptcy notice dated 24 March 2003 was the sum of RM25,470.14 inclusive of interest and costs;

ii) that the bankruptcy notice served on the judgment debtor by way of posting at the judgment debtor's last known address on 10 December 2003 and the posting at the notice board of the High Court Alor Setar was on 6 December 2003;

iii) that the posting at the said premises and the notice board was done after 1 October 2003. According to the notice of advertisement of the petition, 14 days from date of advertisement or the date of posting whichever is later and the act of bankruptcy seven days after posting.

iv) that the act of bankruptcy was committed on 2 January 2004;

3) that according to a letter from the Jabatan Insolvensi Malaysia, Cawangan Pulau Pinang dated 16 March 2005, the judgment creditor was incapable and/or has no cause of action to file the creditor's petition if the amount claimed in the bankruptcy notice is less than RM30,000 if the act of bankruptcy was committed after 1 October 2003.

4) that the amendment to the Act and the Rules on 1 October 2003 where the debt due and owing must be at least RM30,000 before any bankruptcy proceeding is commenced and the only exception given are to cases where the act of bankruptcy was committed prior to 1 October 2003.

5) that there are defects in the order for substituted service purportedly dated 5 May 2005 but the order was obtained on 10 May 2005.

6) that the judgment creditor had failed to comply with the provisions and rules of the Bankruptcy Act and has also failed to comply with the directive of the insolvency department.

[7] In reply to the judgment debtor's affidavit-in-support, the judgment creditor had also filed on affidavit-in-reply affirmed on 15 September 2005. In the said affidavit the judgment creditor stated as follows:

i) that the bankruptcy notice was filed on 24 March 2003 and the judgment creditor was having difficulty in serving the bankruptcy notice on the judgment debtor. The judgment

creditor had obtained an order for substituted service of the bankruptcy notice by advertising in the newspaper and posting at the last known address and notice board of the High Court, Alor Setar.

ii) that the judgment creditor stated that although the bankruptcy notice was advertised in the newspaper on 15 August 2003, and posting at the last known address on 10 December 2003 and at the notice board of High Court, Alor Setar on 6 December 2003, it does not affect the validity of the bankruptcy notice or creditor's petition filed by the judgment creditor.

iii) That the judgment creditor admitted that there was a typographical error relating to the date in the summons-in-chambers which was 10 May 2005. The summons-in-chambers clearly indicate that the date was 10 April 2005 and therefore could not have prejudiced the judgment debtor.

Submission By The Judgment Debtor

[8] The learned counsel for judgment debtor submitted that bankruptcy proceeding contravened s. 5(1)(a) of the Act, in view of the amendment which came into force on 1 October 2003. Section 5(1)(a) of the Act is reproduce for easier reference namely as follows:

Section 5(1) of the Act

(1) A creditor shall not be entitled to present a bankruptcy petition against a debtor unless:

(a) the debt owing by the debtor to the petitioning creditor or if two or more creditors join the petition the aggregate amount of debts owing to the several petitioning creditors, amounts to thirty thousand ringgit; and

(b) the debt is a liquidated sum payable either immediately or at some certain future time; and

(c) the act of bankruptcy on which the petition is rounded has occurred within six months before the presentation of the petition.

[9] The learned counsel for the judgment debtor further submitted that para. 4 of the creditor's petition was incorrect based on the following namely:

a) that the bankruptcy notice dated 24 March 2003 was served on the judgment debtor by way of substituted service as follows namely:

i) the advertisement in the 'Star' newspaper was done on 15 August 2003;

ii) the posting at the notice board of the High Court at Alor Setar was done on 6 December 2003; and

iii) the posting at the judgment debtor's last known address was done on 10 December 2003.

[10] In the order for substituted service it provides as follows namely:

> Service by way of substituted service shall be deemed to be good service of the Bankruptcy Notice after 14 days from the last day of posting.

[11] The date of posting of the bankruptcy notice at the judgment debtor's last known address was on 10 December 2003 and service of the bankruptcy notice was deemed to be good service 14 days thereafter, that was on 24 December 2003. The act of bankruptcy was deemed to have been committed seven days after 24 December 2003 that was on 2 January 2004 taking into account that 25 December 2003 was Christmas Day.

[12] Therefore, the averment by the judgment creditor that the act of bankruptcy was committed on 29 August 2006 was wrong on the facts and ought not to be accepted.

[13] The learned counsel for the judgment debtor further referred to the letter from the Jabatan Insolvensi Malaysia, Pulau Pinang dated 16 March 2005 with regard to the amendment to s. 5(1)(a) of the Act which came into force on 1 October 2003. The view adopted by the Director General of Insolvency Malaysia was that the creditor's petition was valid if the act of bankruptcy was committed prior to 1 October 2003. In the instant case, it was argued that the act of bankruptcy was committed on 2 January 2004. That being the case, the judgment creditor cannot file a

creditor's petition because the debt owing by the debtor to the petitioning creditor amounts to less than RM30,000. In conclusion, it was submitted that the creditor's petition was defective in law and ought to be struck out '*ex-debitio justitiae*'.

Submission By Judgment Creditor

[14] The learned counsel for the judgment creditor submitted that the bankruptcy notice was filed as early as 24 March 2003 but the judgment creditor had difficulty in attempting to serve the said notice on the judgment debtor. The bankruptcy notice had to be served by way of substituted service. The bankruptcy notice was posted at the notice board of the High Court at Alor Setar on 6 December 2003, advertised in the 'Star' newspaper on 15 August 2003 and posting at the judgment debtor's last known address on 10 December 2003, respectively.

[15] The learned counsel for the judgment creditor submitted that since the service of the notice was advertised on 15 August 2003, the service was deemed to be good service upon expiry of the 14 days namely on 29 August 2003 and the act of bankruptcy was deemed to have been committed on 6 September 2003.

Finding Of The Court

[16] The issue for the court to decide in the instant case is the interpretation to be given to s. 5(1) of the Act, as amended. The crucial amendment to s. 5(1) of the Act which came into force on 1 October 2003.

[17] The trust of the argument by the learned counsel for the judgment debtor was that two of the conditions in s. 5(1) of the Act had not been satisfied. The two conditions were that, condition s. 5(1)(a) that is in relation to the fact that since the act of bankruptcy was deemed to have been committed seven days from the 14 days deemed to be good service by way of posting on the judgment debtor's last known address ie, on 10 December 2003, the act of bankruptcy was deemed to have been committed seven days thereafter ie, on 30 December 2003. The learned counsel for the judgment debtor further argued that since the act of bankruptcy was committed after 1 October 2003, the minimum amount of debt due and owing to the judgment creditor should be RM30,000 or more. The amount of debt owing to the judgment creditor was only RM25,470.14.

[18] That being the case, learned counsel for the judgment debtor further submitted that the act of bankruptcy on which the petition is grounded has not occurred within six months before the presentation of the petition.

[19] To fortify its argument, the learned counsel for the judgment debtor referred a letter dated 16 March 2005 from the Jabatan Insolvensi Malaysia, Pulau Pinang addressed to Penang Bar Committee and the contents of the said letter is reproduced for easier reference namely:

> Setiausaha,
> Jawatankuasa Peguam Pulau Pinang,
> (Penang Bar Committee),
> 1st Floor, No. 4 Green Hall,
> 10200 Pulau Pinang
> (U.P. Cik Taryna Lim Luen Jin)
>
> Tuan,
>
> **Pendirian Ketua Pengarah Insolvensi Mengenai Pindaan Kepada Seksyen 5(1)(A) Akta Kebankrapan, 1967 Yang Berkuatkuasa Mulai 1 Oktober 2003**
>
> Adalah saya merujuk kepada perkara tersebut di atas dan memaklumkan bahawa Ketua Pengarah Insolvensi Malaysia kini telah pun membuat suatu pendirian mengenai pindaan kepada Seksyen 5(1)(a), Akta Kebankrapan, 1967 yang berkuatkuasa mulai 1 Oktober 2003.
>
> "Bahawa jika Bankruptcy Notice difailkan sebelum 1 Oktober 2003 dan Act of Bankruptcy berlaku sebelum 1 Oktober 2003, maka Bankruptcy Notice tersebut adalah sah dan petisyen yang difailkan selepas 1 Oktober 2003 adalah sah jika jumlah hutang tidak kurang dari RM10,000.
>
> Sebarang kesulitan yang timbul dalam perkara ini sebelum ini amatlah dikesalkan.
>
> Sekian, terima kasih.
>
> "BERKHIDMAT UNTUK NEGARA"
>
> Saya yang menurut perintah,
>
> T.t.
>
> (N. Dharmasegaran)
> Pengarah Insolvensi Negeri,
> Pulau Pinang
> b.p. Ketua Pengarah Malaysia"

[20] The court takes the view that in so far as s. 5(1)(a) is concerned the bankruptcy notice against the judgment debtor was filed on 24 March 2003 but attempts to serve the bankruptcy notice could not be effected and had to be done by substituted service. In the order for substituted service it provides for the three mode of service of the bankruptcy notice namely by way of an advertisement in the 'Star' newspaper which was done on 15 August 2003 and the posting of the notice at the notice board of the High Court Alor Setar and at the last known address of the judgment debtor was done on 6 December 2003 and 10 December 2005 respectively.

[21] The order for substituted service does provide for the posting of the bankruptcy notice at the notice board of the High Court Alor Setar and at the last known address of the judgment debtor, it would be sufficient for purposes of service of the notice to take 14 days from the date as deemed good service and the act of bankruptcy having committed seven days thereafter.

[22] The advertisement in the 'Star' newspaper is deemed to be notice at large wherever the judgment debtor might be. The judgment debtor could be anywhere in Malaysia, and if he had read the 'Star' newspaper which has a national circulation the judgment debtor would be deemed to have notice of the bankruptcy notice. Which means if the advertisement of the bankruptcy notice was done on 15 August 2003 and deemed to be good service, 14 days thereafter, the act of bankruptcy would have been committed on 5 September 2003.

[23] The court is of the view that the other two modes of service of the bankruptcy notice that was by posting at the notice board of the High Court Alor Setar and posting at the last known address of the judgment debtor were just to complement the service of the notice by way of an advertisement in the national daily newspaper. In fact the two other modes of service became ineffective and impractical especially when attempts to serve the bankruptcy notice was futile. In reality no judgment debtor would come to court to find out whether a bankruptcy notice had been issued against him and thereafter will contact the solicitors for the judgment creditor to accept service thereof. In so far as posting at the last known address of the judgment debtor is concerned this is also not practical because the judgment debtor no longer lived thereat. Any application for substituted service filed by the

judgment creditor, must be shown by affidavit evidence that at least two attempts were made to have an appointment to serve the bankruptcy notice on the judgment debtor.

[24] In the case before the court, the affidavit-in-support of the application for substituted service (encl. 3) exhibited an affidavit of non-service by the process server namely one Rahim bin Ayub affirmed on 6 May 2003 marked at 'exh. AKC1'. The contents of exh. AKC1 stated that on 23 April 2003 at 5.20pm, he went to the last known address at No. LC 1240, Jalan Baling, 09400 Padang Serai, Kedah but was informed by a Chinese man that he did not know the judgment debtor.

[25] On 27 April 2003, the process server again went to the same address at about 11.00am and a Chinese woman told him that the judgment debtor was no longer staying at the said address and further told that the judgment debtor might be staying either at Sungai Bakap or Parit Buntar but without an address. The court is also curious to know as to how the judgment debtor appeared at the office of the solicitors for the judgment creditor and accepted service of the cause papers.

[26] Against this background the court is of the considered view that it would not be fair to the judgment creditor to be faulted for not complying with the other two modes of service when in reality and in practice very rarely the judgment debtor respond to the notice.

[27] In this case, the bankruptcy notice was advertised on 15 August 2003 and 14 days thereafter was deemed as good service and the act of bankruptcy was deemed to have been committed on 5 September 2003. It would not be necessary for the court to consider the validity of the posting of the bankruptcy notice, at the notice board of the High Court at Alor Setar and at the last known address respectively. The two modes of service of the bankruptcy notice was only to complement the advertisement of the notice in the 'Star' newspaper.

[28] In relation to s. 5(1)(c) the court held that the act of bankruptcy on which the petition is grounded has occurred within six months before the presentation of the petition on 14 January 2004. The act of bankruptcy was deemed to have been committed on 5 September 2003, ie, seven days from the date deemed to be

good service of the bankruptcy notice by way of advertisement in the newspaper, and the filing of the petition was 14 January 2004 well within the six months referred to in s. 5(1)(c) of the Act.

[29] In the instant case, the judgment creditor had at the time of filing of the request to file a bankruptcy notice that was on 24 March 2003, the law that was in force was the pre-amended s. 5 which means the debt owing must at least be RM10,000. The debt amount as stated in the bankruptcy notice dated 24 March 2003 was the sum of RM25,470.14.

[30] Reference should be made to s. 30 of the Interpretation Acts which provides as follows:

> 30. Matters not affected by repeal
>
> (1) The repeal of a written law in whole or in part shall not:
>
> (a) affect the previous operation of the repealed law or anything duly done or suffered thereunder; or
>
> (b) affect any right, privilege, obligation or liability acquired, accrued or incurred under the repealed law; or
>
> (c) affect any penalty, forfeiture or punishment incurred in respect of any offence committed under the repealed law; or
>
> (d) affect any investigation legal proceeding or remedy in respect of any such right, privilege, obligation, liability, penalty, forfeiture or punishment,

The word 'repeal' is defined in s. 3 of the Interpretation Acts as follows:

> "repeal" includes rescind, revoke, cancel and replace.

[31] In *Re N Hisham N Mohd Kamal ex-parte AM Finance Bhd* [2009] 7 CLJ 109, where the facts are in all fours with the facts of the instant case where the issue for the court's determination was what is the law applicable that governs the presentation of the petition, is it the pre-amended s. 5 or is it the amended s. 5 of the Act.

[32] The learned judge held:

> that the applicable law should be the law as it stood at the time when the bankruptcy was filed. The words "affect ... anything duly done ... thereunder" in Section 30(1)(a) of the Interpretation Acts 1948 and 1967 of the Interpretation Acts means that since the filing of the Bankruptcy Notice was done when the pre-amended Section 5(1)(a) was still in force, therefore, the applicable law would still be the pre-amended Section 5(1)(a). The applicability of the pre-amended s. 5(1)(a) was also preserved by the words 'affect any legal proceeding ... In respect of any such right ...,' in limb (d) of the same subsection. The Judgment Creditor had already 'acquired' a 'right' to a 'legal proceeding' in bankruptcy against the Judgment Debtor when the Judgment Creditor filed the Bankruptcy Notice on the said date. That right being the right to serve the Bankruptcy Notice on the Judgment Debtor and thereafter to file and service the Creditor's Petition on the Judgment Debtor in the event of failure on the part of the Debtor to comply with the Bankruptcy Notice.

[33] The court is in full agreement with the views expressed by the learned judge and adopt in toto the principle therein to the facts of the instant case.

[34] Based on the reasons as adumbrated above, the court finds that there are no merits in the argument by the judgment debtor and hereby dismissed the appeal (encl. 28) with costs.